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No. 87-208

IN THE

Supreme Court of the United States

October Term, 1986

RAYMOND MIRRER,

Petitioner,

– vs. –

QUASLIM INHAM, Warden, North Facility,
Department of Correction,

Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Rebuttal Arguments

(Reference is to pages of Respondent's Brief)

A. p. 3 Petitioner participated in a massive tax and securities fraud."

There was no evidence of tax fraud. The fraud was in setting up a "front" by prestigious law firms, which was unknown to petitioner; the misuse of funds by the three principal defendants and their secret concealment of receiving more than 10% of investor proceeds 1, 9

B. p. 12 Prof. Bittker testified that the coal programs were abusive and that "no conscientious and informed tax lawyer would disagree."

Bittker's testimony was in error; he did not do any research. His testimony was disputed by defense tax expert, Paul Goldberg as confirmed in respondent's brief, p. 15 2

Bittker failed to consider that 200 experienced professional tax advisors, lawyers and Certified Public Accountants recommended the programs to their clients and at least four other law firms had issued tax opinions similar to the Mirrer tax opinion 6

Case citation which supported deduction based upon cash plus a Promissory Note and support for "at risk" investor liability 5

C. p. 34 A Writ of Certiorari is granted only when there are "special and important reasons."

The Courts below unwittingly accepted the fiction created by respondent 1

The Courts below departed from sound judicial principles in accepting the prosecutor's comments (false representations) as evidence 6

D. p. 35 Petitioner did not show a legitimate dispute over legal principles and presented no novel or unresolved issues of law.

The controlling legal principle is that petitioner, though innefective representation, was convicted of a non-existent, unproven crime... namely filing false tax returns which were not proven to be knowingly false 9

Respondent's Brief, Pg. 15, refers to the tax deductions as being "invalid", not fraudulent, as improperly alleged in the indictment and as commented frequently and unlawfully by the prosecutor 9

The standards for granting a Writ of Habeas Corpus are not well settled (See Petition Pg. 23)

E. p. 47 "The Court of Appeals found that the trial evidence supported the prosecutor's argument."

The prosecutor had a history of incompetence and was improperly permitted to continue his pattern of fraudulent representations. His conduct should not have been supported by the lower Courts 7

F. p. 44 Petitioner did not meet the Strickland v. Washington standard of ineffectiveness of counsel and that Wall's summation was not constitutionally inadequate.

Pg. 45 of respondent's brief affirms and does not dispute that trial testimony was presented that Mirrer was "a competent and diligent lawyer who had acted in good faith and earned the witnesses' admiration and respect"....and that "Mirrer had

conscientiously carried out his 'due diligence' responsibilities."

The omissions of defense counsel John Wall, as outlined in the petition, were so glaring as to leave no doubt that were it not for unprofessional errors, the factfinder would have had reasonable doubt respecting guilt 10

G. p. 53 ..."there have been no 'irreconcilable judicial determinations' in this case."

As outlined in the petition, the State Appellate Division, in affirming the conviction, misstated the facts. Judge Sand of the District Court gave six reasons, all of which were wrong, for denying the habeas Writ and the Circuit Court ignored petitioner's arguments of good faith; ignored the acquittal of two of the major felonies; ignored the lack of evidence on the false filing felony and was arbitrary in finding that petitioner did not meet the Strickland standard in a case where the facts were so overwhelming that defense counsel's conduct so undermined the proper functioning of the adversarial process that the trial could not be relied on as having produced a just result 10

H. p. 55 "Mirrer's petition 'can' be denied as untimely."

Mirrer, inexperienced in federal appeals practice, filed a Petition for Rehearing in Banc which was denied in a notice from the Clerk after a 3-1/2 month delay. Mirrer later learned that it is customary practice in the Second Circuit to deny almost every in Banc petition. Following correspondence with the Chief Judge, the matter was referred to the original panel, supposedly to review its prior findings on the merits. This petition was timely filed after an Order of Denial was filed, signed by the three Circuit Judges that carelessly considered the appeal and refused to review its obvious error 1

Conclusion 10

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Cases Cited

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Estate of Sydney S. Baron v. Comm. IRS
(2d Cir. 8/12/86, Docket No. 85-4072,
No. 623), reported in New York Law
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People of the State of New York v.
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People of the State of New York v.
John Peter Galanis, et. al.
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466 U.S. 668 (1984) ii

United States v. Johnson,
268 U.S. 220 (1925) 1

STATUTES

New York Criminal Procedure Law
Sec. 190.50(5)(a) 8

This Court must not condone and be a consenting party to the obvious deception practiced by respondent in falsely portraying petitioner as a participant in a fraud (p.3). The Courts below, both State and Federal, unwittingly accepted this fiction created by The People of the State of New York. Respondent quoted United States v. Johnson (p.35), yet, has burdended this Court with a lengthly reply with excess single-line spacing, reciting evidence in a grossly distorted manner, not directly related to the Question Presented, and overlooking salient arguments of a non-existent crime and omissions and ineffectiveness of defense counsel. Respondent challenges the timeliness of the filing of this petition which involved special circumstances of the Chief Judge requesting further review by the panel which issued the first and only order of denial of rehearing that was signed by the three Circuit Judges and filed on June 5, 1987. This petition was timely filed within 60 days thereafter on August 4, 1987.

Respondent did not show any evidence presented at trial to prove that petitioner knowingly agreed to participate in the sale of allegedly fraudulent tax shelter programs and failed to show that petitioner deliberately

attempted to mislead investors. Petitioner was convicted of filing allegedly false New York State tax returns, not proven to be false. Tax deductions were taken in an honest belief that coal mining would take place, a factor which was not within the control of the tax attorney. Deductions were disallowed due to a lack of business activity, not due to fraud.

Respondent distorted the value of the testimony of Yale Professor, Boris Bittker. Prof. Bittker claimed that the IVC tax shelter programs were "abusive" because of the allegedly great difference in mark-up between the royalty paid to the landowner (lessor) by the ~~the~~ promoter, IVC, (lessee) and the amount paid by the limited partnership (sub-lessee) to IVC. The Internal Revenue Service looks for assurance that the first year tax deferral could be recouped in later years with reasonable certainty. The estimated tax loss in this matter was based upon a computer printout, using a figure of projected coal which could be mined which must be not more than the 80% of the value of the estimated reserves as outlined in the tax regulations. Prof. Bittker never considered the 80% rule; he did not visit the property and did not conduct any research to

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ascertain the amount of coal reserves.

Edward Ryan, petitioner's law partner, who like petitioner, was both a lawyer and Certified Public Accountant, visited the leased properties in Kentucky on five occasions, the third visit with petitioner. He inspected the properties with local consultants, including his meeting with William Lyons, a licensed Professional Engineer and coal mining specialist who made special geology studies of each of the leased properties and issued reports on the estimated coal reserves. Ryan also visited the University of Kentucky, spoke to coal experts and inspected the government geology reports on file in the college library. He also met with principals of the local Kentucky law firm, Hays & Moss, with petitioner, which had been retained by the Mirrer law firm to reasearch all leases and render opinions as to title. Likewise, each of the three General Partners, two of whom were lawyers, inspected their respective leased properties. C. Edmonds Allen, one of the lawyer General Partners testified that he independently consulted with a mining engineer and an outside law firm and acounting firm prior to his agreeing to become a General Partner and these professionals gave him comfort as to the

feasibility of the IVC coal tax shelter programs, information which he had relayed to petitioner. Ryan had issued reports concerning his visits which contained both favorable and unfavorable comments with Ryan concluding that the projections of coal reserves and cost estimates appeared reasonable; that coal could be mined at a profit and that the partnerships acquired valid leases. This overwhelming testimony of Ryan and others completely overshadowed the weak and professionally incompetent testimony of Bittker who should have known that the term "abusive" is used only where overevaluations are made in partnership property which distorts losses, making them abusive if the values are too high in relation to market value. Here, we were not dealing with losses based upon property values but a first-year loss based upon government geology reports of estimated coal reserves which showed a potential for future profits in later years to offset the one-time tax deduction. Prof. Bittker was further mistaken about the "at risk" provisions, indicating that, even though he was a Professor of Tax Law at Yale University, he lacked practical background on tax shelters. He erroneously overlooked the fact that any investor who lessened his

"at risk" position would have to report as income such lessened risk amount.

In Estate of Sydney S. Baron v. Comm. IRS (2d Cir 8/12/86, Docket No. 85-4072, No. 623), reported on August 25, 1986 in the New York Law Journal, the Circuit Court held that a tax deduction could be taken on the basis of an investment made in both cash and a Promissory Note, which may be nonrecourse, provided the Note is bona fide and the asset securing the Note was equivalent to the face amount to assure collection thereof. Also the Court was obliged to decide whether the purchase of the asset constituted an activity "engaged in for profit". In the IVC programs, investors having substantial net worth, borrowed funds to leverage their investment and signed a full recourse Promissory Note, amounting to three times the cash investment with the borrowed funds being held in an escrow accout for payment against a possible mining disaster. The investor had the right to terminate his loan liability whereby his portion of the escrow funds would be returned to the lender. Prof. Bittker claimed that such right of cancellation never made the investor "at risk", thus, not permitting the non-cash portion of the tax deduction.

However, contrary testimony was produced to show that the right of withdrawal, in itself, did not negate the "at risk" factor as long as the investor remained personally liable to repay the loan.

While Prof. Bittker had impressive credentials, he provided no testimony or evidence of criminal intent or conduct. John Moscow, the prosecutor, ignored the law and rules of ethical conduct and the Courts below mistakenly treated the prosecutor's false representations and distorted comments as evidence, calling for this Court's power of supervision when lower Courts depart from sound judicial principles. The prosecutor made others believe that petitioner knew that the loss (which would have been acceptable if mining had taken place and profits were generated) was not a legally permissible deductible item, making Mirrer's tax opinion supposedly false. He deliberately overlooked testimony that approximately 200 experienced, professional tax advisors, most of whom were lawyers and Certified Public Accountants, recommended the IVC programs to their clients and that at least four other law firms had previously issued tax opinions similar to the Mirrer tax opinion.

The prosecutor willfully violated all concepts of due process. He was previously rebuked and was the cause for dismissal of an indictment for prosecutorial misconduct. He should have been discharged as a member of Mr. Morgenthau's staff, and if so, he would not have been able to make his unlawful presentment to the grand jury as to Mirrer. Of recent date, as reported in the New York Law Journal, August 6, 1987, two days after filing of this petition, Mr. Moscow was again severely criticized and action was taken to protect the rights of an accused party. On the Contrary, Mirrer's constitutional rights, under similar circumstances, were ignored. Justice Marie Santagata, from Nassau County (Second Department), not beholden to Robert Morgenthau, the New York County District Attorney, (First Department), sitting by special assignment in Manhattan, dismissed an indictment against Stanley Friedman because Asst. District Attorney John Moscow gave the grand jurors "unfathomable" examples. Moscow, she said, presented "highly prejudicial and inadmissible evidence "on irrevelant crimes and "gave legal instructions to the grand jury so inadequate and misleading it impaired the integrity of the proceeding".

The panel was confused by "an unclear, unfortunate and inappropriate" example given by him of "a man with 17 perjury convictions who was raped by a pigmy who landed from a spaceship". Stanley Friedman, like Raymond Mirrer, was treated like a "ham sandwich", except that Justice Marie Santagata "cut the mustard" while Justice Benjamin Altman, who presided at Mirrer's pre-trial and trial proceedings, condoning the prosecutor's obviously unlawful behavior and his caustic treatment of Mirrer during his appeareance before the grand jury, as well as other Judges, swallowed the bait.

Petitioner, under a waiver of immunity, appeared voluntarily before the New York County grand jury on December 7, 8 and 9, 1981, pursuant to Sec. 190.50(5)(a) of the Criminal Procedure Law. New York Courts have held that the District Attrorney must allow a witness making such appearance to complete his statement without interruption. Petitioner was interrupted at several points with the prosecutor abusing his position. He displayed hostility and disbelief in a manner calculated to antagonize the jury against Mirrer. He improperly referred to him as a "defendant" that "he does not have the right to bore you to death". When

Mirrer responded to a question about certain dates, the prossecutor retorted, "It could be on Mars". He sarcastically questioned, "Do you speak and understand English?" "Did you pass the bar?" "Are you schizoid?"..."You will permit me to ask the question before you filibuster further". The prosecutor continually cut off questions asked by the jurors, saying that they would be permitted at another time, but the indictment was railroaded through the grand jury before Mirrer was permitted to return, to which he had agreed, at the specific request of the jurors. There could not be the slightest doubt that the prosecutor, as in the Friedman case, improperly influenced the grand jury to indict Mirrer for a non-existent felony crime and that he deliberately misrepresented facts to the trial jury to make them believe that Mirrer induced the filing of allegedly fraudulent New York State tax returns, when he knew that he did not present proof that the returns were knowingly false. P.15 of respondent brief refers to "invalid", not fraudulent, deductions, a critical point.

The May 13, 1987 edition of the New York Law Journal reported the filing of indictments by both Federal and City prosecutors against John Peter Galanis

and several of his associates, charging a conspiracy to create false tax deductions through fictitious business expenditures. Mr. Morgenthau charged the same crimes as were made against petitioner except the false filing charge, which was a known duplicity to the scheme to defraud charge, such false filing charge being omitted in the Galanis indictment, notwithstanding allegations made of the filing of false information. It was obvious that Mr. Morgenthau realized that it was error to duplicate the false filing charge which required intent to defraud and that it should not be included with the crime of scheme to defraud, yet, such error was applied to petitioner. Deficient defense counsel failed to argue this important point to the jury, resulting in a conflicting verdict of guilt of a non-existent crime as to petitioner.

CONCLUSION

Respondent, through a wordy, muddled recital, attempts to delude this Court that petitioner received fair treatment and a fair trial. Respondent failed to adequately rebut arguments made of the omissions and the obvious deficiency and ineffectiveness of defense counsel which led to an unjust verdict, mandating the granting of a Writ of Certiorari.

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Petitioner, Pro Se

September 23, 1987